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Nos. 03-1164, 03-1165

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In The
Supreme Court of the United States

ANN VENEMAN, Secretary,
United States Department of Agriculture, *et al.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,

Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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RULE 29.6 STATEMENT

Livestock Marketing Association (LMA) and Western Organization of Resource Councils (WORC) are non-profit associations. Neither LMA or WORC have any parent corporations or have issued any stock.

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RESPONDENTS' BRIEF IN OPPOSITION

Three terms ago, in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), this Court held that mandatory assessments pursuant to a generic commodity promotion program violated the First Amendment by compelling objecting producers to support speech with which they disagreed. Petitioners now assert that mandatory assessments pursuant to a virtually identical program do not violate the First Amendment because they are "government speech." Since this issue had only been raised before this Court and not in the court of appeals, this Court declined to address government speech in *United Foods*. Distilled to its essence, the question now raised is: are producers' First Amendment rights to be free from compelled speech, as identified and affirmed in *United Foods*, neutered and lost when an otherwise unconstitutional commodity promotion program is recharacterized as government speech?

The Eighth Circuit in this case considered and rejected petitioners' government speech argument, invalidating a commodity promotion program that is substantively identical to the one held unconstitutional in *United Foods*. This result was unsurprising. This Court has never applied the concept of government speech immunity as a justification for violating First Amendment rights. No circuit court has *ever* adopted petitioners' contention that compulsory commodity promotion is government speech that should be immune from the First Amendment. All three circuits that have since considered the issue have joined the Eighth Circuit in rejecting it. There accordingly is no compelling legal issue at stake, no split among the circuits to resolve, and no exigent reason to wade into the uncharted waters of government speech.

Although the Eighth Circuit's decision invalidated an Act of Congress, that result was pre-ordained by *United Foods*. Petitioner has refused to accept or implement this Court's decision in that case, and now asks this Court to grant certiorari for the second time in three years on the constitutionality of substantively identical commodity promotion programs. Lacking the benefit of favorable precedent, petitioners have offered little more than a desired result in search of a supporting theory. Granting the petitions in this case would serve only to disturb the strong consensus that has emerged among the circuits under the guidance of *United Foods*. Certiorari accordingly should be denied.

STATEMENT OF THE CASE

1. Respondent Livestock Marketing Association (LMA) is an association of livestock markets, principally auctions, whose members collect and remit tens of millions of dollars in "beef checkoff" assessments every year. Respondent WORC is an association of grassroots organizations that seek to protect family farms. Respondents Bob Thullner, Johnnie Smith, Pat Goggins, Herman Schumacher, and Jerry Goebel are individual cattle producers subject to the mandatory assessments imposed by the Beef Promotion and Research Act, 7 U.S.C. § 2901 *et seq.* (Beef Act). Although petitioners incorrectly suggest otherwise, because these mandatory assessments are directly linked to respondents' source of livelihood, they have no meaningful opportunity to avoid them. Pet. App. 11a.

The Beef Act is "not imposed as part of a statute or marketing order that comprehensively regulates the

commodity." Petition of U.S., *United States v. United Foods*, No. 00-276 (Aug. 2000) at 13. The cattle production industry is not characterized by collective action. Rather, it is characterized by a free market, and governed by the independent choices of almost one million individual farmers and ranchers and the cyclical laws of supply and demand. Pet. App. 54a. The producers in this case raise cattle sold on the free market at local livestock auctions in South Dakota and Montana. They are strong believers in the superiority of the grain-fed, United States beef that they raise, which they know to be more tender, tastier, healthier, and of higher quality than imported foreign beef, which tends to come from grass-fed animals raised using inferior methods. These plaintiff producers are in favor of requiring beef sold in our supermarkets and restaurants to be labeled according to its country of origin. They also believe that if any national promotion is to be funded by producers, it should expressly market their United States beef as a superior product, to the exclusion of all other beef, so that a specific demand for United States beef may be cultivated among consumers.

2. In 1976, Congress enacted the Beef Research and Information Act, which created a voluntary beef promotion program for cattle producers. Pursuant to this statute, Congress sought "[t]o enable cattle producers to establish, finance, and carry out a coordinated program of research, producer and consumer information, and promotion to improve, maintain, and develop markets for cattle, beef, and beef products." Pub. L. 94-294 (May 28, 1976), 90 Stat. 529. In 1985, Congress enacted the Beef Promotion and Research Act of 1985, extending the original Act and making its assessments against cattle producers mandatory. Pub. L. 99-198, Title XVI, § 1601 (Dec. 23, 1985), 99 Stat. 1354. Legislative history indicates that the Beef Act

was enacted as a "self-help" program for the beef industry, enabling it to marshal its own resources and "devise its own strategies" to increase beef sales while avoiding the intrusiveness of government regulation and unpopular government handouts. *See, e.g.,* Report of Committee on Agriculture, Beef Research and Information Act, H.R.Rep. No. 452, 94th Cong., 1st Sess. 3 (1975); CA App. 415.

a. The Beef Act establishes a multi-tiered procedure utilizing existing state and national beef industry organizations to finance and implement a program of beef promotion and market research. 7 U.S.C. §§ 2901(a)(5), (b), 2904(4)(D), (5), (6). The Beef Act neither authorizes nor permits any funding from the United States government. Instead, its activities are financed entirely by mandatory assessments on all cattle producers and beef importers equivalent to one dollar per head on each sale of cattle or imported beef in the United States. 7 U.S.C. § 2904(8)(C). The Beef Act authorizes the Secretary of Agriculture to issue a Beef Promotion and Research Order and to establish a Cattlemen's Beef Board for its administration. 7 U.S.C. §§ 2903, 2904(1); 7 C.F.R. § 1260.101 *et seq.* These activities were originally authorized in 1987 by a majority of cattle producers voting in a referendum. 7 U.S.C. § 2906. Cattle producers are also empowered to terminate their checkoff program by referendum. 7 U.S.C. § 2906(b). Upon termination, producers receive refunds of all existing unspent checkoff revenues. 7 U.S.C. § 2907(a).

b. The Cattlemen's Beef Board is an independent organization made up of 111 individual domestic cattle producers and importers of foreign beef who direct and administer beef checkoff funds. 7 U.S.C. § 2904(1). Beef Board members are not government officials, but rather are beef industry volunteers nominated by existing private beef industry organizations from various states and

approved in slate fashion by the Secretary. 7 U.S.C. § 2904(1). The Beef Board is charged with administering the Beef Order. 7 U.S.C. § 2904(2). All promotion and other activities, expenses, and staff of the Beef Board are funded entirely by mandatory assessments, and involve no appropriated government or taxpayer funds. The Beef Board has a Chief Executive Officer and issues annual reports to its cattle producer "investors." CA App. 243-62.

c. The Beef Board's activities to promote and advertise beef are selected and developed by the Beef Promotion Operating Committee. 7 U.S.C. § 2904(4)(B), (C). By law, the Operating Committee serves as an independent body, reviewing projects submitted by industry members and determining which projects will receive checkoff funding. CA App. 236-37, 404; Trial Tr. 63, 230-32. Checkoff programs selected by the Operating Committee become effective upon approval of the budget by the Beef Board and the Secretary. 7 U.S.C. § 2904(4)(C). The Operating Committee is composed of 10 members elected by the Beef Board from its own membership and "10 producers elected by a federation that includes as members the qualified State beef councils." 7 U.S.C. § 2904(4)(A); 7 C.F.R. § 1260.161. That "federation" is, in actuality, the checkoff division of the National Cattlemen's Beef Association (NCBA). The NCBA is a private trade and political lobbying association of cattle producers that enjoys a virtual monopoly on the Beef Board's contracts for implementing and carrying out the activities authorized by the Act.[1] Only

[1] Pet. App. 32a. The NCBA has annual revenues of $62,500,000. Approximately $54,400,000, or 87 percent, comes from checkoff dollars that all United States cattle producers, including those who are not NCBA members, are compelled to pay. Trial Tr. 62. This statutorily

(Continued on following page)

about 33,000 of the almost one million cattle producers who pay the beef checkoff belong to the NCBA. CA App. 558. The NCBA was created as the result of a merger when the National Cattlemen's Association absorbed the pre-existing federation of state beef councils described in the Act so that the beef industry could speak with "one voice." Trial Tr. 341-42.

d. Pursuant to the Act, USDA conducts general oversight of the program and ratification of producer-selected expenditures to ensure compliance with statutory provisions. 7 U.S.C. § 2904(6)(B). USDA is not permitted to spend government funds for this ministerial oversight. All such expenses are reimbursed by private checkoff funds as required by the Act. Despite any contrary implication in petitioners' briefs, USDA does not initiate, create, devise, fund, or implement any of the checkoff promotion or other activities. 7 U.S.C. § 2904(6)(B). All proposals for messages to be disseminated with checkoff dollars are formulated by private beef industry contractors. Neither USDA nor the government have any power to select messages or spend checkoff dollars. All such decisions are made by cattle producers themselves. Although these fully-formulated checkoff projects typically "become effective on approval of the Secretary," such approval is pro forma so long as the project does not violate the Act, and implementation of projects frequently begins prior to such approval. 7 U.S.C. § 2904(4)(C), (6)(B); CA App. 427, 431, 450; Trial Tr. 230-32, 371.

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mandated financial support for a private organization exists even though the NCBA advances policies that respondents, among others, believe are harmful to the small, independent cattle producer.

3. In fiscal 2001, beef checkoff assessments totaled $86,099,403. Checkoff dollars are primarily collected by livestock markets where cattle are sold. In the 45 states that have state beef councils, the livestock markets then remit those dollars to the state beef councils. Fifty cents of each dollar is required by law to be sent by the state beef councils directly to the Beef Board, which in fiscal 2001 amounted to $38,629,822. Importers of foreign beef contributed an additional $8.8 million. Because both beef importers and United States cattle producers are required to pay, checkoff-funded projects do not make any distinction between United States beef and imported foreign beef. While United States beef can be specifically promoted in foreign countries, where it is widely acknowledged as the best beef in the world, use of checkoff dollars to promote United States beef domestically is forbidden – only the generic product "beef" can be promoted in the United States. The record establishes that approximately 85 to 90 percent of the Beef Board's checkoff revenues are spent on this generic promotion, with more than 50 percent of total revenues spent specifically on paid generic advertising.[2] Thus, as with the Mushroom Act, the principal object of the Beef Act is speech itself. Pet. App. 11a.

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[2] Trial Tr. 280; Pet. App. 47a. Pursuant to the Act, the term "promotion" means "any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." 7 U.S.C. § 2902(13). Only 10 to 12 percent of checkoff dollars remitted to the Beef Board is expended on beef research. Pet. App. 47a. This research component is statutorily designated for marketing research, product development, and related activities "designed to strengthen the beef industry's position in the marketplace." 7 U.S.C. §§ 2901(b), 2902(15); 7 C.F.R. § 1260.169(b).

Respondents disagree with the "one voice" approach to the cattle industry promoted by the NCBA. On constitutional grounds, they object to the general content of the generic promotion that they are compelled to support through the Beef Act. As producers of United States cattle, they would like to convey the message that United States beef is superior to imported foreign beef. They object that their mandatory assessments are used to disseminate a contrary message, one that promotes beef as a generic commodity and makes no distinction between United States beef and imported foreign beef. Respondents believe that such generic promotion has increased beef importation, supplanting domestic production and acting to suppress market prices obtained by United States cattle producers. They believe that by being required to pay for the generic promotion of beef, rather than only United States beef as they desire, they are actually being compelled to subsidize their own demise. Respondents therefore object on political, ideological, and economic grounds to the messages conveyed by checkoff dollars. They also object to forced association with the NCBA and its political positions through the payment of mandatory assessments that are funneled to that private organization.

While many producers have objected to the Act since its inception, by 1998 frustrations reached a boiling point as producers found themselves paying the checkoff on cattle sold at prices that did not even cover the costs of production. With the assistance of LMA, these producers began circulating petitions seeking a referendum on continuation of the checkoff. In response to the petition drive, the Beef Board significantly increased expenditures on "producer communications," or political messages supporting the checkoff and discouraging cattle producers

from supporting a referendum. Despite this illegal opposition, in November of 1999, LMA submitted more than 145,000 petition signatures from cattle producers in support of a referendum. For a period of fourteen months after receiving these petitions, the Secretary failed to act to validate them and schedule a referendum vote. Pet. App. 33a. On December 29, 2000, respondents brought this action as a challenge to both the Secretary's inaction and the Beef Board's aggressive "producer communications" campaign. On February 23, 2001, following a hearing, the district court granted a preliminary injunction barring the use of checkoff funds to promote the checkoff and oppose a referendum. *See Livestock Marketing Ass'n v. USDA*, 132 F.Supp.2d 817, 829-32 (D.S.D. 2001) (*LMA I*). The parties initiated discovery in preparation for trial of the referendum issues.

After this Court issued its decision in *United Foods*, respondents were permitted to amend their complaint to include broader First Amendment claims. A trial on those claims was held in Aberdeen, South Dakota, on January 14-15, 2002. On June 21, 2002, the district court rejected petitioners' claim that the beef checkoff constituted "government speech" and held that the Beef Act was unconstitutional pursuant to *United Foods*. Pet. App. 56a-60a. The district court issued an injunction enjoining any further collection of mandatory assessments, which was subsequently stayed pending appeal. Pet. App. 60a.

4. The Eighth Circuit affirmed. First, the court of appeals independently reviewed the entire record and agreed with the district court's findings on all crucial facts. Pet. App. 11a. It also agreed that the Beef Act is, in all material respects, identical to the Mushroom Act at issue in *United Foods*, and that its principal object is speech

itself. Pet. App. 11a. The Eighth Circuit then addressed petitioners' prime contention that the Beef Act is immune from First Amendment scrutiny as the result of the government speech doctrine. It began by noting that this doctrine clearly does not provide immunity for all types of First Amendment claims. Pet. App. 16a. Rather, it stands for the general proposition that, "when the government speaks in its role of the government, it may be immune from First Amendment challenge based upon its choice of content." Pet. App. 16a-17a (citing *Keller v. State Bar,* 496 U.S. 1, 12-13 (1990); *Rust v. Sullivan,* 500 U.S. 173, 192-95 (1991)).

The Eighth Circuit observed that this case does not involve a challenge to a decision concerning the content of government speech, but rather to the government's authority to compel respondents to support speech with which they personally disagree, a form of "government interference with private speech." Pet. App. 17a. As the court explained, "[t]he two categories of First Amendment cases – government speech cases and compelled speech cases – are fundamentally different." Pet. App. 17a (citing *Board of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 234-35 (2000)). The court held that this case involved compelled speech and not government speech. Pet. App. 17a-19a.[3] Moreover, even if the Beef Act were to be characterized as government speech, "a determination

[3] At various points, petitioners inconsistently claim that the Eighth Circuit both held and did not hold that the Beef Act's generic promotion is not government speech. *Compare* Fed. Pet. 11 ("In holding that the generic promotion conducted under the Beef Act is not government speech . . . ") *with* Fed. Pet. 18 ("the Eighth Circuit did not hold that the generic advertising at issue is not government speech").

that the expression at issue is government speech does not preclude First Amendment scrutiny in the compelled speech context." Pet. App. 23a n.9 (citing *Wooley v. Maynard,* 430 U.S. 705, 715-17 (1977)). As a result, the Eighth Circuit's analysis was governed by this Court's line of compelled speech precedents. Pet. App. 19a (citing *United Foods; Keller; Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977)).

The Eighth Circuit proceeded to explain that in compelled speech cases, this Court "has traditionally applied a balancing-of-interests test to determine whether or not the challenged governmental action is justified." Pet. App. 19a. (citing *Keller; Wooley*). It observed that in *United Foods*, this Court did not directly address whether such a test was applicable because it had no need to do so: the compelled assessments were unconstitutional under *any* of this Court's precedents. Pet. App. 20a (quoting *United Foods,* 533 U.S. at 409-10). Although the court of appeals proceeded to explain that a "balancing-of-interests" test analogous to the standard articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557 (1980), would, in a close case, be the proper standard to apply, it correctly concluded that this Court had already resolved the question in *United Foods.* Pet. App. 21a-28a. This Court's unequivocal holding in that case, invalidating on identical constitutional grounds an act and order identical to the Beef Act and Order in all material respects, was therefore controlling. Pet. App. 26a ("In the case at bar, however, we need not, ourselves, engage in such a line-drawing exercise. The Supreme Court has already drawn the relevant line for us"). Because the principal object of the Beef Act rendered it unconstitutional, and because Congress had clearly expressed its intent by specifically deleting a pre-existing

severability provision, the Eighth Circuit affirmed the district court's order striking down the act in its entirety. Pet. App. 29a-30a.

ARGUMENT

In *United Foods*, this Court held that the government may not underwrite and sponsor speech with a certain viewpoint using special subsidies compelled from a designated class of persons, some of whom object to the idea being advanced. The Eighth Circuit in this case dutifully applied that controlling decision. During the *United Foods* litigation, the government acknowledged that the Mushroom and Beef Acts are "substantively identical" and that the "orders implementing those programs are also identical in all pertinent respects." Reply Brief of U.S., *United States v. United Foods*, No. 00-276 (Nov. 2000) at 6. It surely should come as no surprise that *United Foods* has resulted in the circuit courts striking down substantively identical statutes, like the Beef Act, based upon that controlling analysis. Petitioners' only identifiable argument not expressly resolved, foreclosed, or rendered immaterial by *United Foods* is their suggestion, which was not raised at trial or in the court of appeals in that case, that generic commodity promotion funded by mandatory producer assessments is government speech for which there should be complete immunity from the First Amendment.

This case is an exceedingly poor vehicle to delve into the substantially unexplored concept of government speech. Petitioners' proffered theory for constitutional immunity is essentially one of form over substance. They suggest that the government may freely circumvent the First Amendment by placing a sufficient number of political controls

over programs that would be otherwise unconstitutional so that the expression at issue is somehow transformed into its own. Petitioners' argument does not even squarely address, let alone refute, the Eighth Circuit's central holding in this case that where individuals are unconstitutionally compelled to support speech with which they disagree, that element of unconstitutional compulsion preempts a formalistic or semantic debate over who is technically "speaking," or has greater control or possessory interest over the content of the expression. This Court should not grant certiorari where petitioners are not prepared to address the Eighth Circuit's analysis directly. Petitioners' argument is illogical on its own terms and irreconcilable with this Court's existing compelled speech precedents. Since *United Foods*, the Eighth, Sixth, Fifth, and Third Circuits have produced uniform results in rejecting it. No circuit court has reached a contrary result. Certiorari should therefore be denied.

I. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE BEEF CHECKOFF PROGRAM IS NOT GOVERNMENT SPEECH AND IS COMPELLED SPEECH THAT VIOLATES THE FIRST AMENDMENT.

A. Generic beef promotion is not government speech.

As the Eighth Circuit held, when the Beef Act compels respondents to support speech to which they object, the result is not government speech, but rather a form of "government interference with private speech." Pet. App. 17a. This holding is entirely sound. The government speech doctrine has its genesis in the notion that an individual taxpayer may not raise a First Amendment challenge to the payment of taxes or the government's use

of tax dollars. *See Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). From this basic concept, a line of discussion has developed in several cases implicitly recognizing, almost entirely in dicta, that where the government speaks for itself by funding and promoting its own policies and positions, its speech may be exempt from the First Amendment.

This Court's leading case on the subject, *Rust v. Sullivan*, was only identified in subsequent decisions as exemplifying speech by the government. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). None of this Court's post-*Rust* cases that allude to government speech actually apply that concept to preempt constitutional rights. *See id.*; *Southworth*, 529 U.S. at 235; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-35 (1995); *Keller*, 496 U.S. at 11-13 (preceding *Rust*). As a result, petitioners have attempted to construct their government speech claim inferentially, without the benefit of favorable precedent directly on point. Under any of this Court's precedents, generic beef promotion under the Beef Act is not constitutionally immune "government speech," but rather government facilitation of private beef industry speech that objecting cattle producers are unconstitutionally compelled to support.

1. All four circuit courts to have considered petitioners' government speech argument have rejected it. In the present case, of course, the Eighth Circuit held that compelled subsidization of generic promotion under the Beef Act does not constitute government speech, but government interference with private speech. Pet App. 17a. Similarly, in *Michigan Pork Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003), the Sixth Circuit held that promotional activities funded through the Pork Promotion, Research and Consumer Information Act of 1985, 7 U.S.C. § 4801 *et seq.* (Pork Act) amounted to

private expression, rather than government speech. As the Sixth Circuit explained, "the costs and content of the speech in question are almost completely the responsibility of members of the pork industry. The First Amendment does not lie dormant merely because the government acts to consolidate and facilitate speech that is otherwise wholly private." 348 F.3d at 162.

The Fifth Circuit, as well, recently relied on this Court's precedents to reject a contention that compelled assessments to the state-enacted Louisiana Alligator Resource Fund were unconstitutional, holding that "the generic marketing at issue is not government speech, but government facilitation of the private speech of fur and alligator harvesters." *Pelts & Skins, LLC v. Landreneau*, No. 03-30523 at 11 (5th Cir. April 2, 2004). As the Fifth Circuit explained:

> [I]n this case we confront a program in which the government uses its authority to exact fees from private individuals, then facilitates the use of those fees to express a message designed to benefit private commercial interests. This sort of program is not government speech.

Id. at 16.

In addition, the Third Circuit has twice held that generic commodity promotion programs do not constitute government speech. In *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), it held that the Beef Act was not government speech because, among other factors, it was funded solely by the beef industry and its promotional messages were attributed to cattle producers. As the court explained, "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular

message associated with that group, the government has directly focused its coercive power for expressive purposes." *Id.* That element of targeted compulsion weighed against concluding that the speech at issue was that of the government, regardless of how USDA oversight under the Beef Act was characterized:

> This sort of funding scheme, with its close nexus between the individuals and the message funded, more closely resembles the *Abood* situation, where the unions, as exclusive bargaining agents, served as the locuters for a distinguishable segment of the population, i.e., the employees, or the *Wooley* case, where the state "require[d] an individual to participate in the dissemination of an ideological message by displaying it on his property in a manner and for the express purpose that it be observed and read by the public," . . . regardless of whether the state-issued license plates constituted "government speech."

Id. at 1132-33. As a result, the Third Circuit concluded that "the underlying rationale of the right to be free from compelled speech or association leads us to conclude that the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as 'government speech.'" *Id.* at 1132.

More recently, in *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), the Third Circuit again rejected petitioners' argument that generic commodity promotion is government speech when it invalidated the Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.* (Dairy Act). The Third Circuit relied upon its earlier holding in *Frame* on the government speech issue, explaining that "[a]though this court's First Amendment discussion and

ultimate holding in *Frame* have been abrogated by *Glickman* and *United Foods*, none of the Court's subsequent decisions regarding 'government speech' undermine our analysis of that issue in *Frame*." *Id.* at 274. It accordingly held that the Dairy Act involved private expression, not government speech, and "thus is not immune from First Amendment scrutiny." *Id.* Thus, five circuit court decisions have now addressed petitioners' government speech argument, and it has been soundly rejected in each. Certiorari should not be granted where unanimity exists among the circuits.

2. In rejecting petitioners' government speech argument, the Eighth Circuit and other circuit courts relied upon this Court's controlling decision in *Keller*, 496 U.S. at 11-13, in which this Court unanimously rejected an assertion that mandatory assessments against attorneys used to fund expressive activities by the State Bar, a legislatively created entity, constituted "government speech" for purposes of the First Amendment. *Keller* is this Court's most substantive treatment of what does not constitute government speech, is the only such decision to examine government speech within the context of compelled speech, and specifically rejects its applicability to legislatively enacted mandatory assessments that target discrete groups to pay for objectionable speech. Petitioners have not successfully distinguished this Court's rejection of government speech immunity for the unconstitutional assessments in *Keller* from the otherwise unconstitutional assessments at issue in this case. Certiorari should not be granted where this Court's existing precedents efficiently control resolution of the question presented.

3. When the government speaks, it is usually readily apparent that the government itself is the literal speaker or that a government message has been selected and

funded by the government. *See, e.g., Rust*, 500 U.S. at 198-99. Unlike those circumstances, generic beef promotion in this case is funded by cattle producers, associated with and attributed to cattle producers, and designed to benefit the private commercial interests of the beef industry. Petitioners' argument that establishing governmental control over expression provides immunity from the First Amendment unpersuasively places administrative structure over substance and effect. If accepted, petitioners' claim that government oversight is coextensive with government speech would allow the government to nullify the First Amendment at will simply by attaching nominal indicia of control to programs that are otherwise unconstitutional under settled law. In effect, the stronger the government censorship, the more exempt it would become from First Amendment scrutiny. The Eighth Circuit properly rejected petitioners' invitation to reorder this Court's existing precedents with such sweeping constitutional implications, simply to resuscitate a generic commodity promotion program that is substantively identical to one so recently held unconstitutional in *United Foods*.

a. The Eighth Circuit's rejection of petitioners' government speech argument is consistent with the general principle, identified in this Court's decisions discussing government speech, that any purported constitutional latitude is inherently derived from the government's right to direct public funds and implement government-funded programs.[4] This Court has never accepted the proposition of constitutional immunity where

[4] *See Rust*, 500 U.S. at 198-99; *Rosenberger*, 515 U.S. at 833; *Southworth*, 529 U.S. at 229; *Keller*, 496 U.S. at 10-11; *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring).

the government, rather than using its own funds to deliver its own message, has instead compelled a targeted group to pay for the dissemination of a particular message specifically associated with that group to which some members object. *See Keller*, 496 U.S. at 10-11; *United Foods*, 533 U.S. at 411 ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors"). The Eighth Circuit in this case accordingly has not, as petitioners theatrically suggest, "called into question the government's ability to convey its own message to the public." Fed. Pet. 11. If the government itself truly wished to engage in generic beef promotion, Congress is obviously free under this Court's precedents to appropriate from its general revenues to do so.

b. Given the substantial record developed at trial below, the Eighth Circuit was plainly correct in concluding that beef industry activities facilitated by the Beef Act are not fairly characterized as government speech. Petitioners are now claiming a government speech exemption from the First Amendment for a program which until very recently was touted as being controlled by producers. Since the Beef Act's inception, cattle producers have enjoyed assurance that the beef checkoff is their "self-help" industry program, funded by cattle producers, led by cattle producers, and established for their benefit. CA App. 236; Trial Tr. 250. Checkoff promotion is universally attributed to cattle producers. No mention is ever made of the government or USDA. Trial Tr. 96. The Beef Board has repeatedly confirmed that the content of its activities is a function of the decisions of cattle producers, not the government. CA App. 244, 449, 540. Only after this Court issued its decision in *United Foods* did petitioners completely reverse field and suddenly postulate that "Beef: It's

What's For Dinner" advertisements and other promotion "funded by America's Beef Producers" and copyrighted by "National Cattlemen's Beef Association and Cattlemen's Beef Board" are messages from the United States government. CA App. 51. The lower courts correctly rejected this suggestion as factually preposterous. Pet. App. 56a.

The government's role in checkoff activities is one of simple ministerial oversight to ensure statutory compliance, for which USDA is fully reimbursed. CA App. 431, 450; Trial Tr. 230, 244, 288, 370-71. The Beef Act does not permit the government to conceive, develop, edit, direct, or fund any checkoff message or program. Instead, the Act simply indicates that fully developed projects, conceived by cattle producers and beef industry representatives, "shall become effective on the approval of the Secretary." 7 U.S.C. § 2904(6)(B). This approval is pro forma so long as projects do not violate or exceed the authority of the Act. CA App. 431, 450; Trial Tr. 371. Certiorari should not be granted to exhume and reexamine the lower courts' plainly accurate factual assessment that USDA's "limited" oversight over beef industry activities does not transform generic beef promotion into government speech. Pet. App. 24a, 55a-57a.

c. In suggesting that the Beef Board should be considered a governmental entity that is entitled to abridge First Amendment freedoms with impunity, petitioners rely principally on this Court's decision in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995). As the Eighth Circuit correctly recognized, however, *Lebron* is wholly inapplicable to this case. Pet. App. 18a n.5. The *Lebron* decision involved neither government speech nor compelled speech, but rather the alleged governmental suppression of political speech. *Lebron* simply made clear that the government, by resorting to corporate form, could not

evade the constraints of the First Amendment. 513 U.S. at 397-99. It expressly distinguished between treating a corporation as an agency of the government "for purposes of the constitutional *obligations* of Government *rather than the 'privileges* of the government,'" and held that the corporation's conduct in that case amounted to state action that violated the First Amendment. *Id.* at 399 (emphasis supplied).

The principle established in *Lebron* is that the government, in whatever form, is *constrained* by the First Amendment. That decision provides no support for the contrapositive proposition that by in some fashion resorting to corporate form, the government becomes immune from constitutional scrutiny and may freely abridge First Amendment freedoms by "compelling certain individuals to pay subsidies for speech to which they object." *United Foods*, 533 U.S. at 410. Thus, as the Eighth Circuit correctly held, *Lebron* speaks nothing to the present situation in which private individuals are unconstitutionally compelled to support objectionable speech, and stands for a premise that is the polar opposite of asserted First Amendment immunity.

d. In any event, petitioners' criticism of the lower courts' assessment of the degree to which USDA actually influences or controls generic promotion generated under the auspices of the Beef Act eludes the true issue in this case. As the Eighth Circuit recognized, a fact-bound assessment regarding the actual degree of governmental control is not ultimately dispositive on the larger question of government speech immunity. Pet. App. 23a n.9. Although the government frequently facilitates private speech, and oversees and constrains numerous areas of private expression, such oversight does not accomplish a transubstantiation of private speech into that of the government. *See San Francisco Arts & Athletics, Inc. v.*

U.S. Olympic Comm., 483 U.S. 522, 544 (1987) ("Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government"); *Rosenberger*, 515 U.S. at 833 (explaining that student activities fund administered by state university did not involve government speech, but rather a governmental initiative designed to encourage and facilitate private speech); *Velasquez*, 531 U.S. at 542 (explaining that "the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message").

Regardless of how extensive USDA's oversight might be characterized, that the government has established some boundaries for private expression does not alter its essential character. Petitioners' suggestion that the government should be able to immunize itself from constitutional restrictions by *increasing* control over private expression cuts against the very heart of First Amendment freedoms. If adopted, it would reorder this Court's present conception of the government speech doctrine as a potential shield, protecting the government's inherent right to direct public funds, into that of a sword, permitting the violation of constitutional rights by controlling private speech and requiring objecting citizens to individually subsidize and endorse messages with which they disagree. The Eighth Circuit wisely declined to endorse such an ominous concept.

B. The beef checkoff program is compelled speech that violates the First Amendment.

1. Petitioners' assertion that labeling an action "government speech" conclusively negates the First

Amendment rights of those affected cannot be reconciled with this Court's bright line of compelled speech precedents in *Barnette*, *Wooley*, *Abood*, *Keller*, and *United Foods*. Even if one characterized generic beef promotion under the Beef Act as government speech, it still would not be immune from the First Amendment under this Court's compelled speech precedents. Pet. App. 23a n.9. As the Eighth Circuit properly observed, "[t]he two categories of First Amendment cases – government speech cases and compelled speech cases – are fundamentally different." Pet. App. 17a.

The unconstitutional compulsion of speech involves some state action that demands support from private individuals for speech with which they disagree. *See United Foods*, 533 U.S. at 410-11. Such activity is fundamentally inconsistent with the freedom of belief that lies at the core of all First Amendment guarantees. *See id.* The government speech doctrine clearly does not provide immunity from all types of First Amendment claims, nor do the cases suggest that when the government speaks, it is entirely immune from all types of First Amendment free speech claims. Pet. App. 16a (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302-10 (2000)); *Velasquez*, 531 U.S. at 542 (explaining that "[n]either the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however").

Although the government can obviously speak for itself in its role as the government, or even retain others for the purpose of communicating its messages that are funded with government revenue, *see Rust*, 500 U.S. at 192-95, it may not selectively compel private individuals or groups to fund, subscribe to, or advance speech favored by others or favored by the government. *See United Foods*, 533 U.S. at 411; *Keller*, 496 U.S. at 12-13. The constitutional right to be free from compelled speech is therefore

not automatically nullified by characterizing the offending message as that of the government. Pet. App. 16a-19a.

As the Eighth Circuit recognized, this principle is reinforced by this Court's decision in *Wooley*, 430 U.S. at 715-16, where the issue was whether objecting New Hampshire motorists could be compelled to convey the state motto, "Live Free or Die," on their state-issued license plates. Pet. App. 23a n.9. There is little doubt that this government-selected motto would constitute government speech, yet the chosen message was clearly not immune from First Amendment scrutiny. *See id.* at 717 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message"). This principle is illuminated equally well by *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), where this Court applied the First Amendment to strike down legislation compelling West Virginia public school students to recite the Pledge of Allegiance, the quintessential example of government speech.

Where, as here, the challenged activity veers from government speech, financed by general revenues, to forced speech, effected through compelled monetary contributions from a selected group with whom the speech is associated, one has crossed the Rubicon into the unconstitutional territory delineated by *Abood*, *Keller*, and *United Foods*. The Eighth Circuit therefore properly concluded that the analysis in this case is governed by this Court's compelled speech precedents. Regardless of whether it is characterized as government speech, generic commodity promotion funded by mandatory, targeted assessments against producers who object to the messages associated with them runs afoul of the First Amendment,

and petitioners' strained analogy to a disgruntled taxpayer objecting to taxes simply does not pertain.

2. Petitioners have abandoned their claim, advanced in the lower courts, that the constitutionality of the Beef Act is controlled by this Court's analysis in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), rather than *United Foods*. Rejection of their government speech argument accordingly affirms the Eighth Circuit's holding that the Beef Act unconstitutionally compels speech pursuant to the analysis set forth in *United Foods*. As an additional basis for certiorari, petitioners assert that the Eighth Circuit's conclusion that the Beef Act does not withstand intermediate First Amendment scrutiny under the standard articulated in *Central Hudson* is in conflict with the Third Circuit's pre-*United Foods* decision in *Frame*, 885 F.2d at 1134-37, creating a purported circuit split that requires this Court's intervention to resolve. This claimed basis for certiorari has been neatly dispelled by the Third Circuit itself in *Cochran*, 359 F.3d at 274, which post-dated the petitions. In striking down the unconstitutional Dairy Act, the Third Circuit held that its First Amendment analysis and ultimate conclusion in *Frame* had been abrogated by this Court's contrary decision in *United Foods*. *See Cochran*, 359 F.3d at 274. Thus, no viable circuit split remains on this issue, if indeed one ever existed post-*United Foods*.

Even had *Cochran* not made *Frame*'s abrogation explicit, petitioners' contention that the compelled assessments in this case are constitutional under *Central Hudson* is clearly incorrect, and has been foreclosed by this Court's decisions in both *Glickman* and *United Foods*. In *Glickman*, this Court held that it was "error for the Court of Appeals to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments

for promotional advertising," 521 U.S. at 474, and strongly suggested that *Central Hudson*, which involved a restriction on commercial speech, had no applicability in any case involving the compelled funding of speech. *Id.* at n.18. Instead, this Court explained that the "germaneness" test applied in *Abood* (and in *Keller*) would logically be the appropriate test for assessing the constitutionality of compelled speech in any similar context. *Id.*

Four terms later, in *United Foods*, after observing that the *Central Hudson* approach had been the subject of criticism, this Court held that it "need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." 533 U.S. at 409-10. Thus, this Court determined that the mandatory assessments were unconstitutional under *any* applicable precedent, including the lesser protection afforded by *Central Hudson*.

Although the Eighth Circuit in this case concluded that, in its view, the *Central Hudson* test could be adapted for situations involving compelled commercial speech, it correctly acknowledged that in *United Foods*, this Court had already resolved the outcome produced by such an analysis by holding unconstitutional, under any of this Court's precedents, a program identical to the beef checkoff program in all material respects. Pet. App. 26a-28a. As a result, the Beef Act's compelled assessments cannot survive First Amendment scrutiny under any of this Court's precedents, including *Central Hudson*, without overruling *United Foods*, which petitioners have declined to ask this Court to do. This Court should not grant certiorari on a question rendered immaterial by controlling precedent.

II. THE LOWER COURTS PROPERLY INVALIDATED THE BEEF ACT IN ITS ENTIRETY AND ENJOINED FURTHER COLLECTION OF UNCONSTITUTIONAL ASSESSMENTS.

Lastly, petitioners have unpersuasively assailed the lower courts' grant of relief, suggesting that an injunction prohibiting continued enforcement of an unconstitutional law was overly broad. This issue is completely unworthy of certiorari review. Both circuit courts to consider the issue of remedy when a commodity promotion program has been held unconstitutional pursuant to *United Foods* have granted the identical relief. Pet. App. 28a-30a, 57a-59a (invalidating Beef Act in its entirety and entering nationwide injunction); *Michigan Pork Producers*, 348 F.3d at 163-64 (invalidating Pork Act in its entirety and entering nationwide injunction). In addition, the Third Circuit in *Cochran*, 359 F.3d at 280, recently reversed the district court's erroneous decision sustaining the Dairy checkoff and remanded with directions to enter a decree that the Act, not simply a portion thereof, was unconstitutional.

1. Petitioners claim that relief from the unconstitutional assessments should only apply to the five cattle producers who testified at trial, and should not apply on a nationwide basis. This suggestion is consistent with USDA's strategy of pretending that *United Foods* was never decided. Since that decision in June of 2001, USDA has defied this Court by continuing to promulgate new marketing orders virtually identical to the program held unconstitutional in *United Foods*. *See, e.g.*, Lamb Promotion, Research and Information Order; Final Rule, 67 Fed. Reg. 17848 (No. 124) (April 11, 2002) (promulgating lamb order even where prior referendum among lamb producers rejected checkoff promotion, 62 Fed. Reg. 34,683 (June 27, 1997)). Meanwhile, hundreds of millions of dollars of

unconstitutionally compelled checkoff payments continue to be collected with the inscrutable rationalization that generic commodity promotion might be government speech. This, despite this Court's longstanding admonition that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Petitioners' theory that each individual cattle producer who objects to a program that is unconstitutional under this Court's settled precedents should be required to prosecute a lawsuit in order to preserve their First Amendment rights does not have resonance. The lower courts correctly determined that all cattle producers, not simply the named plaintiffs, should be entitled to the benefit of *United Foods*.

2. Petitioners also urge that relief from the unconstitutional Beef Act should be limited to assessments allocated to generic promotion, exempting collateral checkoff activities such as administrative expenses and marketing research. Congress, however, intended otherwise, acting to expressly delete a previously existing severability provision, as noted by the court of appeals. 7 U.S.C. § 2901 (Historical and Statutory Notes); Pet. App. 29a. As this Court has held, "[t]he inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999).

As with the unconstitutional mushroom checkoff, the principal object of the Beef Act is speech itself. Pet. App. 11a. The factual record demonstrates that approximately 85 to 90 percent of the Beef Board's checkoff revenues are spent on generic beef promotion, with more than 50 percent spent specifically on paid advertising. Trial Tr. 280; 7 U.S.C. § 2902(13). Courts do not have authority to

"rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935). If core activities are constitutionally invalid, there is no reason to continue extracting funds from producers and directing them through an arcane and complex administrative structure that has been stripped of its central purpose. Such a remedy would judicially reorder the Beef Act into something that it was never intended to be.

It is inconceivable that Congress would have enacted a national scheme of mandatory assessments on every live cattle transaction in the United States, co-opting hundreds of millions of dollars in cattle producer income and funneling it through a chain of state and national beef industry organizations, councils, boards, and committees for the sole purpose of conducting isolated marketing research related to beef. *See id.*; *Mille Lacs Band*, 526 U.S. at 191 (holding that Presidential Order, adjudged under same standard as legislative enactments, was not severable because it "embodied a single, coherent policy" and was intended "to stand or fall as a whole"). United States cattle producers did not vote to adopt, and would never have initially adopted, a program of mandatory assessments that did not have as its central purpose the promotion of beef. 7 U.S.C. § 2906(a). Because the principal object of the Beef Act is "not permitted under the First Amendment," *United Foods*, 533 U.S. at 416, and given Congress's actions ensuring that the Beef Act's provisions could not be construed as severable, the lower courts acted properly in invalidating the Act as a whole.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.[8]

Respectfully submitted,

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[8] Should, however, this Court elect to grant the petition in this case or the corresponding petition involving the Pork Act filed in *Veneman v. Campaign for Family Farms*, No. 03-1180 (Feb. 2004), respondents respectfully suggest that both cases be heard, so that in considering the broader context of both statutes and attendant factual records, the constitutionality of generic commodity promotion programs in which the principal object is speech itself can be settled once and for all.